

DEBORAH D. BEITLER
Claimant

KLAVER CONSTRUCTION COMPANY, INC.
Respondent

BITUMINOUS INSURANCE COMPANIES
Insurance Carrier

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ORDER

APPEARANCES

RECORD

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a 95 percent work disability. Respondent and its insurance carrier requested this review and contend claimant is entitled to receive benefits for a scheduled injury only. In the

alternative, if the Appeals Board finds a nonscheduled injury, respondent and its insurance carrier contend claimant would be limited to benefits for her functional impairment only because she refused vocational rehabilitation services and has otherwise removed herself from the open labor market.

The only issue before the Appeals Board on this review is the nature and extent of claimant's impairment and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award should be modified.

The parties stipulated claimant injured her right ankle while working for the respondent on June 1, 1994. A principal issue is whether claimant has also sustained permanent injury to her back as a natural consequence of the ankle injury. If so, claimant should receive permanent partial disability benefits for a nonscheduled injury under K.S.A. 44-510e. See Reese v. Gas Engineering & Construction Co., 216 Kan. 542, 532 P.2d 1144 (1975).

Based upon the testimony of Pedro A. Murati, M.D., who is board certified in physical medicine and rehabilitation, the Appeals Board finds claimant has sustained permanent injury and impairment to both her right lower extremity and low back as a result of the June 1994 accident. At the insurance carrier's request, Dr. Murati treated claimant between March and May 1995. He diagnosed a fracture in the right ankle, early reflex sympathetic dystrophy in the right leg, and a lumbar strain secondary to the right leg injury. Based upon Mr. Murati's testimony, the Appeals Board finds claimant has sustained an 11 percent whole body functional impairment as a result of the right leg and low back injuries and should restrict herself to sedentary type work with maximum lifting and carrying of 10 pounds.

Because hers is an "unscheduled" injury, K.S.A. 44-510e governs the computation of claimant's permanent partial disability benefits. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of

the average gross weekly wage that the employee was earning at the time of the injury.

Dr. Murati was the only physician to provide an opinion regarding the extent of claimant's task loss. As indicated in their briefs, counsel agree claimant's task loss equals 81 percent if Dr. Murati's opinions and the proper number of tasks are utilized. The Appeals Board finds Dr. Murati's opinions regarding task loss are persuasive and, therefore, finds claimant has lost the ability to perform 81 percent of the work tasks she previously performed during the 15-year period preceding her accident.

At the time of regular hearing claimant was not working. However, based upon the testimony of vocational consultant Diana Joseph, the Appeals Board finds claimant did not cooperate in a vocational rehabilitation program offered by respondent and, therefore, a post-injury wage should be imputed for purposes of the wage loss prong of the permanent partial disability formula. The Appeals Board finds claimant's failure to cooperate with a job placement plan is conceptually equivalent to the refusal of accommodated employment and, therefore, the public policy principles apply which were set forth in Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). When considering the entire record, the Appeals Board finds claimant has not exercised good faith in attempting to return to work after her work-related accident.

The Appeals Board finds claimant retains the ability to earn \$210 per week despite her accident and resultant injuries. That conclusion is derived by considering the testimony presented by labor market expert Jerry Hardin who indicated claimant could earn between \$200 and \$240 per week working in the Kingman, Kansas, area where she lives and, also, considering the present federal minimum wage of \$5.15 per hour of which the Appeals Board is taking official notice. Comparing claimant's stipulated average weekly wage of \$260 to her post-injury ability to earn \$210 per week which is slightly higher than minimum wage, the Appeals Board finds claimant has a 19 percent difference in pre- and post-injury wages.

As K.S.A. 44-510e requires, the Appeals Board averages claimant's 81 percent task loss with the 19 percent wage loss and finds that claimant has a 50 percent permanent partial disability upon which her award should be based.

The Appeals Board hereby adopts the findings and conclusions set forth by the Administrative Law Judge in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated March 19, 1997, entered by Administrative Law Judge Nelsonna Potts Barnes

should be, and hereby is, modified to award claimant permanent partial disability benefits for a 50 percent work disability.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Deborah D. Beitler, and against the respondent, Klaver Construction Company, Inc., and its insurance carrier, Bituminous Insurance Companies, for an accidental injury which occurred June 1, 1994, and based upon an average weekly wage of \$260 for 59.86 weeks of temporary total disability compensation at the rate of \$173.34 per week or \$10,376.13, followed by 185.07 weeks at the rate of \$173.34 per week or \$32,080.03, for a 50% permanent partial general body disability, making a total award of \$42,456.16.

As of September 19, 1997, there is due and owing claimant 59.86 weeks of temporary total disability compensation at the rate of \$173.34 per week or \$10,376.13, followed by 112.43 weeks of permanent partial disability compensation at the rate of \$173.34 per week in the sum of \$19,488.62 for a total of \$29,864.75, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$12,591.41 is to be paid for 72.64 weeks at the rate of \$173.34 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts the remaining orders set forth by the Administrative Law Judge in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terry L. Pullman, Wichita, KS
Christopher J. McCurdy, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director